



**ISSUES**

1. Did claimant suffer an accidental injury on March 4, 2006, which resulted in an injury to her right upper extremity? Claimant alleges she fell on March 4, 2006 and injured her right arm. Respondent counters that claimant had ongoing right arm problems well before the alleged fall and any disability is related to claimant's earlier problems.
2. Did claimant provide respondent with notice of this accident within 10 days? If not, was there just cause to extend the period for providing notice to 75 days?

**FINDINGS OF FACT**

Claimant testified that on March 4, 2006, while working for respondent as a housekeeper, she slipped on water in the respondent's pool area, landing on her right arm. Claimant initially did not believe the injury to be significant, but later, her hand began to go numb. Claimant did not think that she had broken anything and was fearful for her job, so she did not tell respondent of the right arm injury. However, claimant had suffered a right foot injury earlier in her employment with respondent, and this injury resulted in claimant being taken off work the day after the fall. Claimant testified that the problems she was having with her foot caused or contributed to the fall.

When claimant's hand went numb, claimant sought medical treatment on April 24, 2006 at Wesley Medical Center, and was diagnosed with ulnar neuropathy. She then reported the incident to respondent on April 28, 2006. The doctors who were treating claimant for her foot injury referred her to Benjamin R. Norman, M.D. for her arm injury. Claimant was told that she needed a nerve conduction test. She was later referred to board certified orthopedic surgeon George H. Lucas, M.D. for treatment of the arm injury.

Claimant had been a patient of Dr. Lucas for several years, beginning as early as 1989. He treated her for ulnar nerve problems in her right elbow in 1992, median nerve problems in 1993 and several years thereafter, and bilateral carpal tunnel syndrome and ulnar nerve involvement of the wrist through 1995. In 2000, claimant reported shooting pains in both arms. Dr. Lucas removed a ganglion cyst from her left hand at which time she reported numbness and tingling. Dr. Lucas also treated claimant for a right thumb carpometacarpal arthroplasty in 2001.

Dr. Lucas next saw claimant, on July 20, 2006, on a referral from Dr. Norman. Claimant provided Dr. Lucas with the history of the fall on March 4, 2006, indicating the reason for the fall was the trouble with her foot. On August 9, 2006, claimant displayed decreased sensation at the right little finger and ring finger, a positive Tinel's sign in the right ulnar groove and a mild Tinel's sign over the median nerve at the right wrist. Dr.

Lucas determined that there was no acute injury to claimant's right ulnar nerve when he saw her in July and August, 2006. He reviewed the August 3, 2006 report from Cal Olmstead, M.D. discussing the NCT/EMG tests done on claimant which indicated problems with her right elbow, but nothing acute related to the ring and little fingers of her right hand. Dr. Lucas performed surgery on claimant on September 14, 2006, ultimately diagnosing cubital tunnel syndrome and ulnar nerve compression *at the right elbow*.

After the surgery, Dr. Lucas saw claimant on several occasions, last seeing her in May, 2007. In his May 2, 2007 letter to Dow Ragan, claims adjustor for AIGCS, Dr. Lucas rated claimant at 7 percent permanent partial impairment of her right upper extremity. This was based on her complaints of numbness in the hand, but did not involve her right shoulder. Dr. Lucas testified that this rating was actually between 5-7 percent of the upper extremity and was pursuant to the AMA Guides 4<sup>th</sup> Ed. He also testified that the condition was due to claimant's persistent and continuing ulnar nerve irritation and had nothing to do with the alleged March 4, 2006 accident. The ulnar nerve problems displayed by claimant were problems claimant had for many years. Additionally, he opined that the alleged accident described by claimant would not likely injure the ulnar nerve. Dr. Lucas found it significant that the history provided him by claimant included no mention of her striking her elbow at the time of the fall.

On March 27, 2007, claimant was examined by Michael H. Munhall, M.D., at the request of her attorney, Dr. Munhall, board certified in physical medicine and rehabilitation was told that claimant had a history of right carpal tunnel syndrome with surgery and a resolution of all right arm pain and numbness prior to employment with respondent. Claimant denied having right elbow pain or right hand numbness immediately before the March 4, 2006 injury. He found claimant sustained a 10 percent permanent partial impairment of the right upper extremity due to right ulnar neuropathy from the March 4, 2006 accident. He did not apportion any of the right upper extremity impairment to the previous conditions or the previous care provided by Dr. Lucas. Dr. Munhall had no rating or treatment notes for claimant's right arm after August 12, 1994.

A May 1, 2006 office note of Dr. Benjamin Norman contained a history that claimant suffered a fall, striking her right medial elbow with bruising in the mid right bicep area.

Ms. Mancuso is here saying that she suffered a fall at work on 3-4-06. She did strike her right medial elbow. She had some swelling and bruising in the mid right biceps area and immediate numbness and tingling in the ulnar side of the forearm and fourth and fifth fingers. Initially the tingling seemed to come and go. She decided not to report the incident. It has persisted. It has gradually gotten worse. Finally the numbness in the hand has been continuous. She became frightened recently and went to the ER on 4-24-06 fearing that she might be having a stroke.

She was diagnosed there with ulnar neuropathy and subsequently reported this to her job and they send [sic] her here for evaluation.<sup>2</sup>

The Board finds claimant struck her right elbow when she fell.

After the fall, claimant had numbness and tingling in her forearm, fourth and fifth fingers. But that sensation would come and go so claimant did not report the incident. But as the problems persisted and worsened to the point her hand numbness was continuous, she initially sought emergency room care because she thought she was having a stroke.<sup>3</sup> After the stroke was ruled out and claimant was diagnosed with ulnar neuropathy, she then reported her slip and fall incident to respondent. Claimant additionally noted that she did not initially report the slip and fall because she felt intimidated as the day before the incident the hotel manager had reprimanded her for not getting her work done on time.

#### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>4</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>5</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>6</sup>

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his

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<sup>2</sup> P.H. Trans. (June 29, 2006), Cl. Ex. 1.

<sup>3</sup> *Id.*

<sup>4</sup> K.S.A. 44-501 and K.S.A. 44-508(g).

<sup>5</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>6</sup> K.S.A. 44-501(a).

employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."<sup>7</sup>

In workers' compensation litigation, when a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.<sup>8</sup>

Respondent argues that claimant failed to prove that she suffered a personal injury by accident which arose out of and in the course of her employment. While it appears that claimant did fall on March 4, 2006, there is a dispute regarding whether claimant injured her right upper extremity during that fall. Dr. Lucas testified that claimant did not injure her right upper extremity from the fall as the mechanics of the fall were not such as to cause the injuries he diagnosed in claimant's arm. Instead, Dr. Lucas concluded that claimant's ongoing arm problems were the result of her ongoing and long standing right upper extremity problems.

The Board is not persuaded by Dr. Lucas' causation opinion. A careful review of Dr. Lucas' medical records does not support the doctor's conclusion. In short those records indicate the doctor diagnosed ulnar neuritis in August 1994, and in January 1995 an EMG indicated the ulnar nerve problem was *at the wrist*. The doctor's records do not indicate claimant had an ongoing ulnar nerve problem at the right elbow. More importantly, Dr. Lucas based his causation opinion on the mistaken belief that claimant did not strike her right elbow when she fell. Accordingly, Dr. Lucas' opinion regarding causation is based on a false premise and, therefore, shall be given little weight.

Dr. Munhall found that claimant's accident of March 4, 2006 was sufficient to cause the injuries suffered by claimant to her upper right extremity. In addition, claimant testified she was not having upper extremity symptoms immediately before her March 2006 fall.

The Board finds claimant's testimony, coupled with the opinion of Dr. Munhall, to be convincing and persuasive. Accordingly, the Board finds claimant injured her right upper extremity on March 4, 2006, in an accident that arose out of and in the course of her employment with the respondent.

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<sup>7</sup> *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

<sup>8</sup> *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.<sup>9</sup>

Respondent contends that claimant failed to provide timely notice to respondent of the alleged March 4, 2006 accident, as required by K.S.A. 44-520. Claimant did not report her accident within 10 days. After the fall claimant did not think her hand problem was significant and thought it would resolve. But when her hand went numb and she was diagnosed with ulnar neuropathy she reported the fall to respondent. That was April 28, 2006, and within 75 days of the accident.

K.S.A. 44-520 states:

The ten-day notice provision provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident . . . .<sup>10</sup>

Claimant provided notice to respondent within 75 days of the accident. Claimant testified that although she knew she was required to report work-related accidents she was unaware of the 10 day notice requirement. And while there was testimony that a poster explaining the requirement was in a glass case outside the human resource office, there is no testimony that claimant stopped and read that document. Additionally, it was a combination of factors that led claimant to her delay in notifying respondent of the accident. Claimant did not think that she had broken anything in the fall and initially, her hand symptoms were not of much concern. Moreover, claimant was concerned about her job security after she was admonished the day before the accident to perform her work faster. Finally, claimant's primary concern was her foot pain which resulted in her being taken off work after the slip and fall. It was not until her hand pain led to a trip to the emergency room that claimant concluded her condition needed treatment. Then she notified respondent of the accident.

The Board is persuaded by claimant's testimony. Accordingly, the Board concludes the delay in reporting the hand injury was justified. Therefore, under K.S.A. 44-520 claimant's notice to respondent was timely as it was given within 75 days of the accident.

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<sup>9</sup> K.S.A. 44-520.

<sup>10</sup> K.S.A. 44-520.

The Board is persuaded by Dr. Munhall's opinion regarding functional impairment and finds that claimant has sustained a 10 percent impairment to the right upper extremity as a result of the March 2006 accident.

### **CONCLUSIONS**

Having reviewed the entire evidentiary file, the Board finds the Award of the ALJ should be modified as claimant has proven (1) she injured her right upper extremity during her fall on March 4, 2006; (2) she provided respondent with timely notice as required by K.S.A. 44-520; and (3) she sustained a 10 percent impairment to her right upper extremity.

### **AWARD**

The ALJ's Award is affirmed in that claimant has proven that she suffered an accidental injury on March 4, 2006, which arose out of and in the course of her employment with respondent. Claimant failed to give notice of her accident but provided just cause for that failure. As claimant did provide notice within 75 days of the accident, claimant has satisfied the requirements of K.S.A. 44-520. Claimant's award is modified to grant claimant a 10 percent permanent partial disability to the right upper extremity.

Claimant is awarded 4.00 weeks of temporary total disability compensation at the rate of \$168.02 per week in the amount of \$672.08 followed by 17 weeks permanent partial disability compensation at the rate of \$168.02 in the amount of \$2,856.34 for a total award of \$3,528.42. As of the date of this award, the entire amount is due and owing and ordered paid in one lump sum, minus any amounts already paid.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October, 2008.

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BOARD MEMBER

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**DISSENT**

The undersigned Board Members respectfully dissent from the opinion of the Majority. We find the opinion of Dr. Lucas, claimant's treating physician, to carry the most weight with regard to whether claimant suffered an accidental injury which resulted in the injuries to her right upper extremity. Dr. Lucas is a board certified orthopedic surgeon and had been claimant's treating physician for a multitude of upper extremity conditions since 1989. He had a detailed history of claimant's upper extremity problems and had performed surgery on claimant in the past. The problems presented to him by claimant in her right upper extremity represented either no change from past exams or a natural consequence of her preexisting conditions. Claimant had ulnar nerve problems for many years, including intermittent complaints of numbness in the ulnar nerve distribution as far back as 1993. He diagnosed no acute injury when he saw claimant in July and August 2006. Finally, according to Dr. Lucas, the type of accident suffered by claimant is not the sort of thing which would cause injury to the ulnar nerve.

While Dr. Munhall testified that claimant's right upper extremity injuries were the result of the fall on March 4, 2006, he was not provided with a complete file on claimant's prior right upper extremity problems, injuries and treatment. Dr. Munhall had no rating or treatment notes for claimant's right arm after August 12, 1994. In fact, Dr. Munhall was told that claimant had no right elbow pain or right hand numbness until March 4, 2006. For this reason, the undersigned Board Members find the opinions of Dr. Munhall to carry less weight than those of Dr. Lucas.

As such, it should be found that claimant has failed to prove that she suffered an accidental injury to her right upper extremity on March 4, 2006, which arose out of and in the course of her employment with respondent. Therefore, the award of the ALJ should be reversed and claimant denied an award in this matter.

The Majority also finds that claimant had just cause for failing to provide timely notice of her accident. This Board has set out factors to be considered in determining whether just cause exists to permit claimant to file an untimely notice of accident. Those factors are (1) the nature of the accident, including whether the accident occurred as a single, traumatic event; (2) whether the employee is aware that she sustained an accidental injury on the job; (3) the nature and history of claimant's symptoms; and (4) Whether the employee is aware or should be aware of the requirements of reporting a work-related accident, and whether the respondent has posted notice as required by K.A.R. 51-13-1.<sup>11</sup> Here, claimant's alleged accident was a single traumatic slip and fall, and there is no doubt claimant was aware of the incident on the date of accident. Additionally, claimant was aware of the requirement that an injury be reported. Claimant

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<sup>11</sup> *Russell v MCI Business Services*, No. 201,706, 1995 WL 712402 (Kan. WCAB Oct. 9, 1995).

had suffered an earlier injury to her right foot and was aware of the reporting requirement due to that injury.<sup>12</sup> Respondent had posted the required notice from the Division of Workers Compensation explaining a workers rights and obligations. This posting was right outside the office of respondent's human resources administrator, Ramona Mendenhall. Ms. Mendenhall testified that claimant came to her office when reporting the original foot injury.

Claimant talked to Tammy, her manager, on March 5<sup>th</sup>, 2006 but failed to mention the arm injury. When asked if that was correct, claimant stated "that is right, because that was my last working day because of the foot."<sup>13</sup>

Because claimant suffered a specific trauma before this March 4, 2006 accident, it is evident that claimant was aware that reporting an accident was required. The poster from the Division gave specifics regarding the time allowed to report an accident, and claimant walked by this posting when entering Ms. Mendenhall's office. There is insufficient justification for claimant to have waited until April 28, 2006 to report this accident to respondent. The undersigned Board Members would find that claimant did not have just cause for failing to timely report this accident to respondent pursuant to K.S.A. 44-520.

For the above reasons claimant's request for benefits in this matter should be denied.

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BOARD MEMBER

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BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant  
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier  
John D. Clark, Administrative Law Judge

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<sup>12</sup> P.H. Trans. (June 29, 2006) at 18.

<sup>13</sup> *Id.* at 16.